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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

YOUNG WO KWON,

Plaintiff and Appellant,

v.

HARBOR EXPRESS, INC. et al.,

Defendants and Respondents.

B247625

(Los Angeles County  
Super. Ct. No. NC044037)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roy L. Paul, Judge. Affirmed.

Law Offices of Christopher E. Dwyer and Christopher E. Dwyer; and Lee & Advocates, Yohan Lee and Chong H. Roh for Plaintiff and Appellant.

Law Offices of Laura Each Nguyen and Laura Each Nguyen for Defendants and Respondents.

## I. INTRODUCTION

Plaintiff, Young Wo Kwon, appeals from a judgment following a trial court's order granting summary judgment in favor of defendant, Harbor Express, Incorporated. Plaintiff alleged defendant was negligent in securing its premises, causing him injury. Defendant's summary judgment motion was granted. Defendant argued plaintiff failed to raise a triable issue of material fact concerning duty, breach, causation, or injury to him. Plaintiff argues the trial court erred because there are triable issues of material fact because defendant owed a duty to provide security and safety on its property. We affirm the judgment on inadequate record and causation grounds.

## II. BACKGROUND

### A. Plaintiff's First Amended Complaint

On June 5, 2012, plaintiff filed his first amended complaint. Plaintiff alleges the following. On June 4, 2009, plaintiff was attacked by the codefendant, Andrew Jung, while in defendant's dispatch room. Defendant, as the owner of the premises, was negligent for failing to exercise due care to ensure that visitors like plaintiff were not subject to an unreasonable risk of harm. Mr. Jung, who secured a chapter 7 bankruptcy discharge, is no longer a party to this appeal.

### B. Summary Judgment Motion, Opposition And Reply

On September 4, 2012, defendant filed its summary judgment motion. Defendant argued: it was not vicariously liable for Mr. Jung's alleged actions; there was no evidence Mr. Jung acted in the scope of his employment ; it had no duty of care because plaintiff did not present evidence the alleged attack was foreseeable ; there was no breach of a duty ; and there was no evidence its acts or omissions caused plaintiff any injuries.

On November 21, 2012, plaintiff filed his opposition. Plaintiff argued defendant was aware of an existing potential antagonism with Mr. Jung. Plaintiff asserted defendant's employee handbook prohibited violence on its property which created a duty. Plaintiff contended because defendant had knowledge of existing hostility with Mr. Jung and it was foreseeable an incident could occur. Plaintiff asserted defendant maintained insufficient security which led to his injury. On November 28, 2012, defendant filed its reply. Defendant argued plaintiff provided no evidence that allegedly insufficient security caused his injury. Defendant contended plaintiff never notified management that he feared for his safety.

### C. Undisputed Facts

Defendant is a Wilmington, California trucking company. Plaintiff was a truck driver performing deliveries on behalf of defendant as an independent contractor. Mr. Jung was a truck driver performing trucking services on behalf of GNC, one of defendant's vendors. Mr. Jung was not defendant's employee. Mr. Jung and plaintiff did not get along. Mr. Jung and plaintiff argued prior to the June 4, 2009 incident because of a personality dispute.

The June 4, 2009 incident did not involve any aspect of the work performed on behalf of defendant. There is a security guard at defendant's facility at all times. The security guard was onsite on the date of the incident. The incident occurred in the waiting area at defendant's facility. Defendant's employee, Frank Solares, was present in the office area adjoining the waiting area on the date of the incident. Mr. Jung has no prior criminal record. Mr. Jung and Mr. Solares declared they were unaware of any fist fights or other physical disputes at defendant's facility prior to the incident at issue.

#### D. Additional Facts

Defendant submitted additional disputed facts. When the incident occurred, Mr. Solares intercepted Mr. Jung and plaintiff and separated them. After separating them, Mr. Solares walked back to the dispatch office with Mr. Jung. Plaintiff re-engaged Mr. Jung and they fought again. Mr. Solares again separated them.

Plaintiff submitted additional facts. Quite some time prior to June 4, 2009, plaintiff witnessed one fight in the waiting room. As noted, this was prior to the incident involving Mr. Jung. Defendant had received complaints about plaintiff regarding his rude and insulting comments directed towards other drivers. At a work-sponsored dinner in 2007, held by defendant's then director, plaintiff allegedly struck a fellow driver, Sung Woo Park, in the head and laughed. Plaintiff told "numerous third parties" that Mr. Jung was violent and "some sort" of a criminal.

Mr. Jung attacked plaintiff on the day of the incident. Plaintiff's initial fight with Mr. Jung was broken up by fellow drivers. Afterwards, Mr. Jung attacked plaintiff a second time, at which point apparently Mr. Solares came out. Mr. Solares and the other drivers then separated Mr. Jung and plaintiff.

Defendant had a workplace policy against violence. The policy stated: "The safety and security of the Company's employees are of vital importance. Acts or threats of physical violence, including intimidation, harassment, and/or coercion, which involve or affect the Company, or which occur on Company property, will not be tolerated. [¶] This prohibition against threats and acts of violence applies to all person involved in the operation of the Company, including, but not limited to, Company employees, contract and temporary workers and anyone else on Company property. Violations of this policy, by any individual, will lead to disciplinary action up to and including termination and/or legal action as appropriate."

### E. Trial Court's Order

On December 7, 2012, the trial court granted defendant's summary judgment motion. The trial court found defendant was not liable for general negligence or premises liability for the following grounds: it owed plaintiff no duty of care; it did not breach any duty; there was no evidence of causation; and there was no evidence of damages. Plaintiff subsequently appealed.

## III. DISCUSSION

### A. Overview

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851, our Supreme Court described a party's burdens on summary judgment motions as follows: "[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . . [¶] [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (Fns. omitted, see *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) We review the trial court's decision to grant the summary judgment motion de novo. (*Coral Construction, Inc. v. City and County of San*

*Francisco* (2010) 50 Cal.4th 315, 336; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 67-68.) The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling not its rationale. (*Coral Construction, Inc. v. City and County of San Francisco, supra*, 50 Cal.4th at p. 336; *Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196.) In addition, a summary judgment motion is directed to the issues framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, overruled on a different point in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527.) Those are the only issues a motion for summary judgment must address. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1249-1250; *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364.)

Plaintiff contends he presented triable issues of material fact because defendant had prior notice of potential criminal conduct. Plaintiff argues defendant had a duty of care to ensure people are safe on its premises because it provided security. Plaintiff asserts he presented evidence defendant's security failed to act reasonably under the circumstances. We disagree and find plaintiff has not raised a triable issue of material fact concerning causation.

#### B. No Reporter's Transcript Or Adequate Substitute

No reporter was present during the hearing granting defendant's summary judgment motion. In numerous situations, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 273-274 [transfer order]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [attorney fee motion hearing]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 (lead opn. of Grodin, J.) [new trial motion hearing]; *In re Kathy P.* (1979) 25 Cal.3d 91, 102 [hearing to determine whether counsel was waived and the minor consented to informal adjudication]; *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1672

[transcript of judge's ruling on an instruction request]; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447 [trial transcript when attorney fees sought]; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [surcharge hearing]; *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657 [nonsuit motion where trial transcript not provided]; *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [monetary sanctions hearing]; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532 [reporter's transcript fails to reflect content of special instructions]; *Buckhart v. San Francisco Residential Rent Etc. Bd.* (1988) 197 Cal.App.3d 1032, 1036 [hearing on Code Civ. Proc., § 1094.5 petition]; *Sui v. Landi* (1985) 163 Cal.App.3d 383, 385-386 [motion to dissolve preliminary injunction hearing]; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 713-714 [demurrer hearing]; *Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 71-73 [transcript of argument to the jury]; *Ehman v. Moore* (1963) 221 Cal.App.2d 460, 462 [failure to secure reporter's transcript or settled statement as to offers of proof]; *Wetsel v. Garibaldi* (1958) 159 Cal.App.2d 4, 10 [order confirming arbitration award].) Here, no reporter was present for the summary judgment motion hearing. Plaintiff did not submit an adequate substitute. On that ground alone, the judgment must be affirmed.

### C. Premises Liability And Prior Notice Of Criminal Conduct

Defendant argues that plaintiff failed to demonstrate any act on its part was a substantial factor in causing any harm. In premises liability cases, causation is an essential element of a negligence claim. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 778; *Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421, 424, 439.) Defendant provided an external security guard and an employee, Mr. Soares, who acted to insure a safe work environment. At some point, Mr. Soares intervened to stop the altercation. This was sufficient to shift the burden of production of evidence to plaintiff. Where the production burden shifts, the plaintiff must present specific facts showing the existence of a triable controversy. (Code Civ. Proc., § 437c, subd. (p)(2); *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 490; *Wiz Technology, Inc. v.*

*Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11.) Plaintiff presented no properly qualified opinion testimony concerning the necessity for a higher degree of security staffing. Nor were there non-speculative inferences that could be drawn from the evidence that lack of a higher degree of security staffing was a legal cause of plaintiff's injuries. Plaintiff failed to present specific facts on the causation issue to support his negligence claim. Thus, summary judgment was properly entered. (*Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at pp. 776-779; *Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1116-1117; *7735 Hollywood Blvd. Venture v. Superior Court* (1981) 116 Cal.App.3d 901, 905; *Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1373; *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 488; *Nola M. v. University of Southern California, supra*, 16 Cal.App.4th at pp. 424, 439.) In view of the court's findings on the issue of the causation, we need not address defendant's remaining contentions.

#### IV. DISPOSITION

The judgment is affirmed. Defendant, Harbor Express, Incorporated, is awarded its appeal costs from plaintiff, Young Wo Kwon.

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TURNER, P. J.

I concur:

MINK, J.\*

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\* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.



Kwon v. Harbor Express

B247625

MOSK, J., Concurring

I concur.

As we review the summary judgment motion de novo based on the written submissions, and there is no issue as to evidentiary objections or anything that occurred at the hearing, I do not believe a transcript of the hearing is necessary. (See *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 699.) I agree with the remainder of the majority opinion.

MOSK, J.